

**STATE OF INDIANA
DEPARTMENT OF STATE REVENUE**

IN REGARDS TO THE MATTER OF:

**AMERICAN LEGION POST #340
DOCKET NO. 29-2003-0401**

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND PROPOSED ORDER**

An administrative hearing was held on Tuesday, October 28, 2003 in the office of the Indiana Department of State Revenue, 100 N. Senate Avenue, Room N248, Indianapolis, Indiana 46204 before Bruce R. Kolb, Administrative Law Judge acting on behalf of and under the authority of the Commissioner of the Indiana Department of State Revenue.

Petitioner, American Legion Post #340, was represented by William Owens, Commander. Steve Carpenter appeared on behalf of the Indiana Department of State Revenue.

A hearing was conducted pursuant to IC 4-32-8-5, evidence was submitted, and testimony given. The Department maintains a record of the proceedings. Being duly advised and having considered the entire record, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law and Proposed Order.

REASON FOR HEARING

On September 2, 2003, the Petitioner was assessed civil penalties in the amount of three thousand dollars (\$3,000) and its license was suspended for a period of three (3) years. The Petitioner protested in a timely manner.

SUMMARY OF FACTS

- 1) The Indiana Department of Revenue Criminal Investigation Division conducted an investigation of the Petitioner on April 28, 2003.
- 2) On September 2, 2003, the Petitioner was assessed civil penalties in the amount of three thousand dollars (\$3,000) and its license was suspended for a period of three (3) years.

FINDINGS OF FACTS

- 1) The Indiana Department of Revenue Criminal Investigation Division initiated an investigation of the Petitioner on April 28, 2003. (Record at 9).
- 2) According to the Department's letter dated September 2, 2003, the Petitioner did not maintain accurate records of its pull tab sales for the periods ending April 2000, 2001, and 2002.

- 3) The Department used records, subpoenaed from the distributors Petitioner used, showing what games were purchased during the periods in question. (State's Exhibit C).
- 4) A spread sheet of income generated from those games was developed. (State's Exhibit C).
- 5) Due to the failure to maintain accurate records the Petitioner underestimated its charity gaming license fees. (State's Exhibit C).
- 6) On June 11, 2003, the Criminal Investigation Division (CID) of the Indiana Department of Revenue along with the Indiana State Excise Police found four (4) cherry master video poker machines in Petitioner's Post. (State's Exhibit B).
- 7) The illegal gambling devices were photographed by the Indiana State Excise Police on June 11, 2003. (State's Exhibit B).
- 8) The Petitioner was charged with 1 count of being a public nuisance.
- 9) Petitioner was cited by the Indiana State Excise Police for possession of a gaming device under IC 35-45-5-3, and promoting professional gambling pursuant to IC 35-45-5-4. (State's Exhibit B).
- 10) The Department then notified Petitioner by letter that its Indiana Charity Gaming License was suspended for a period of three (3) years and was assessed one thousand dollars (\$1,000).
- 11) Petitioner stated that the previous Commander of their Post had stolen money from the Post and had destroyed the records in question. (Record at 20).
- 12) The current Post Commander stated that they had filed police reports and spoke to the local prosecutor. (Record at 31 & 32).
- 13) The Petitioner contends that they have lots of items in their charity gaming stock but have no idea what they have. (Record at 23).
- 14) The Petitioner was asked, "So is it fair to say you have no records prior to June 2002, because there was another commander?" Petitioner's representative responded, "Right". (Record at 30).
- 15) Again Petitioner's representative was asked, "Did you ever contact any of the distributors to get information to reconstruct those records?" The response was, "No, we didn't -- well we had an accountant, and the accountant was taking care of our business." The Department's representative then stated, "But my question was did you contact—did you or anybody on your behalf contact the distributor to get information to reconstruct the records..." The Petitioner replied, "No, we didn't." (Record at 30).
- 16) When asked whether the Petitioner had gaming machines in their lodge the Petitioner's representative responded, "Yes, we have them." (Record at 31).

STATEMENT OF LAW

- 1) Pursuant to 45 IAC 18-8-4, the burden of proving that the department's findings are incorrect rests with the individual or organization against which the department's findings are made. The department's investigation

establishes a prima facie presumption of the validity of the department's findings.

- 2) The Department's administrative hearings are conducted pursuant to IC § 4-21.5 et seq. (See, House Enrolled Act No. 1556).
- 3) "[B]ecause Pendelton's interest in his insurance license was a property interest, and not a liberty interest. Rather, a preponderance of the evidence would have been sufficient." Pendelton v. McCarty, 747 N.E. 2d 56, 65 (Ind. App. 2001).
- 4) "It is reasonable...to adopt a preponderance of the evidence standard where it can be demonstrated that a protected property interest exists." Burke v. City of Anderson, 612 N.E.2d 559, 565 (Ind.App. 1993).
- 5) IC 4-32-11-3 The license fee that is charged to a qualified organization that renews the license must be based on the total gross revenue of the qualified organization from allowable events and related activities in the preceding year or, if the qualified organization held a license under IC 4-32-9-6 through IC 4-32-9-10, the fee must be based on the total gross revenue of the qualified organization from the preceding event and related activities
- 6) IC 35-45-5-4 provides, "Except as provided in subsection (b), a person who:
 - (1) knowingly or intentionally owns, manufactures, possesses, buys, sells, rents, leases, repairs, or transports a gambling device, or offers or solicits an interest in a gambling device;
 - (2) before a race, game, contest, or event on which gambling may be conducted, knowingly or intentionally transmits or receives gambling information by any means, or knowingly or intentionally installs or maintains equipment for the transmission or receipt of gambling information; or
 - (3) having control over the use of a place, knowingly or intentionally permits another person to use the place for professional gambling; commits promoting professional gambling, a Class D felony.
 (b) Subsection (a)(1) does not apply to a boat manufacturer who:
 - (1) transports or possesses a gambling device solely for the purpose of installing that device in a boat that is to be sold and transported to a buyer; and
 - (2) does not display the gambling device to the general public or make the device available for use in Indiana.
 (c) When a public utility is notified by a law enforcement agency acting within its jurisdiction that any service, facility, or equipment furnished by it is being used or will be used to violate this section, it shall discontinue or refuse to furnish that service, facility, or equipment, and no damages, penalty, or forfeiture, civil or criminal, may be found against a public utility for an act done in compliance with such a notice. This subsection does not prejudice the right of a person affected by it to secure an appropriate determination, as otherwise provided by law, that the service,

facility, or equipment should not be discontinued or refused, or should be restored.”

- 7) IC 35-45-5-3 provides that, “A person who knowingly or intentionally:
 - (1) engages in pool-selling;
 - (2) engages in bookmaking;
 - (3) maintains, in a place accessible to the public, slot machines, one-ball machines or variants thereof, pinball machines that award anything other than an immediate and unrecorded right of replay, roulette wheels, dice tables, or money or merchandise pushcards, punchboards, jars, or spindles;
 - (4) conducts lotteries, gift enterprises, or policy or numbers games, or sells chances therein;
 - (5) conducts any banking or percentage games played with cards, dice, or counters, or accepts any fixed share of the stakes therein; or
 - (6) accepts, or offers to accept, for profit, money or other property risked in gambling; commits professional gambling, a Class D felony.”
- 8) IC 4-32-9-17 states, “A qualified organization shall maintain accurate records of all financial aspects of an allowable event under this article...”
- 9) IC 4-32-9-17 further states, “...A qualified organization shall make accurate reports of all financial aspects of an allowable event to the department within the time established by the department...”
- 10) Under IC 4-32-12-1, The department may suspend or revoke the license of or levy a civil penalty against a qualified organization or an individual under this article for any of the following:
 - (1) Violation of a provision of this article or of a rule of the department.
 - (2) Failure to accurately account for:
 - (A) bingo cards;
 - (B) bingo boards;
 - (C) bingo sheets;
 - (D) bingo pads;
 - (E) pull tabs;
 - (F) punchboards; or
 - (G) tip boards.
 - (3) Failure to accurately account for sales proceeds from an event or activity licensed or permitted under this article.
 - (4) Commission of a fraud, deceit, or misrepresentation.
 - (5) Conduct prejudicial to public confidence in the department.

(b) If a violation is of a continuing nature, the department may impose a civil penalty upon a licensee or an individual for each day the violation continues.
- 11) IC 4-32-12-2 states, “The department may impose upon a qualified organization or an individual the following civil penalties:(1) Not more than one thousand dollars (\$1,000) for the first violation.(2) Not more than two thousand five hundred dollars (\$2,500) for the second violation.(3)

Not more than five thousand dollars (\$5,000) for each additional violation.”

- 12) IC 4-32-12-3 states, In addition to the penalties described in section 2 of this chapter, the department may do all or any of the following:
 - (1) Suspend or revoke the license.
 - (2) Lengthen a period of suspension of the license.
 - (3) Prohibit an operator or an individual who has been found to be in violation of this article from associating with charity gaming conducted by a qualified organization.
 - (4) Impose an additional civil penalty of not more than one hundred dollars (\$100) for each day the civil penalty goes unpaid.

CONCLUSIONS OF LAW

- 1) It is the charitable organization itself that is granted the license to conduct charity gaming.
- 2) The members that run the charitable organization are responsible for maintaining the organization’s charitable status.
- 3) The members of the charitable organization are responsible for making sure that all charity gaming laws are followed.
- 4) Any violation of the Indiana charity gaming laws subjects the charitable organization to fines and penalties.
- 5) Even after the members of an organization who are purported to have violated charity gaming laws are gone or removed from office, the charitable organization is ultimately responsible for the violations, and therefore will be subject to any fines and penalties imposed by the Department.
- 6) Pursuant to 45 IAC 18-8-4, the burden of proving that the department’s findings are incorrect rests with the individual or organization against which the department’s findings are made. The department’s investigation establishes a prima facie presumption of the validity of the department’s findings.
- 7) Petitioner’s representative admitted under oath that the Petitioner did not possess any financial records for the periods in question, and that they had illegal gambling machines on the premises.
- 8) The reconstructed records show that the Petitioner underestimated the amount of gross proceeds it received, and as a result Petitioner owes additional license fees for the years at issue.

PROPOSED ORDER

Following due consideration of the entire record, the Administrative Law Judge orders the following:

Petitioner’s appeal is denied.

- 1) Administrative review of this proposed decision may be obtained by filing, with the Commissioner of the Indiana Department of State Revenue, a written document identifying the basis for each objection within fifteen (15) days after service of this proposed decision. IC 4-21.5-3-29(d).
- 2) Judicial review of a final order may be sought under IC 4-21.5-5.

THIS PROPOSED ORDER SHALL BECOME THE FINAL ORDER OF THE INDIANA DEPARTMENT OF STATE REVENUE UNLESS OBJECTIONS ARE FILED WITHIN FIFTEEN (15) DAYS FROM THE DATE THE ORDER IS SERVED ON THE PETITIONER.

Dated: _____

Bruce R. Kolb / Administrative Law Judge